



United States  
Department of  
Agriculture

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**TO:** WHOM IT MAY CONCERN

**FROM:** JAMES H. WOOD  
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**SUBJECT:** Subpoenas for Testimony or Records from an Employee of the United States Department of Agriculture ("USDA")

The purpose of this memorandum is to inform interested persons of the restrictions on testimony by employees of USDA and of restrictions on production by such employees of official records in their custody.

Pursuant to regulations published by the Secretary of Agriculture, codified at 7 C.F.R. §§ 1.210 ff., employees of USDA may neither make an appearance nor produce records in response to subpoenas in cases in which the United States is not a party, unless specifically authorized to do so by the field head of the specific USDA agency by which they are employed. The term "appearance," as used in these regulations, includes an affidavit, deposition, interrogatory, or other required written submission.

Title 5 U.S.C. § 301 provides that the head of an executive department may prescribe regulations for the government of that department, the conduct of its employees, and the custody, use, and preservation of its records, papers, and property.

A subpoena directed to an employee of the United States, in the employee's official capacity, whether or not also commanding production of documents, is an action against the United States and is therefore governed by the sovereign immunity of the United States, except insofar as such immunity has been waived.

The principal case authority for issuance of subpoena regulations is United States ex rel. Touhy v. Ragen, 340 U.S. 462, 71 S.Ct. 416, 95 L.Ed. 417 (1951). In Touhy, the United States Supreme Court held that an agency has the authority to restrict by regulation the testimony of its employees, and that a federal employee may not be compelled to obey a subpoena contrary to a supervisor's instructions issued under valid agency regulations.

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A particularly thorough discussion of these principles, dealing with cases in which the United States was not a party, is found in Boron Oil Co. v. Downie, 873 F.2d 67 (4<sup>th</sup> Cir. 1989). See also State of Louisiana v. Sparks, 978 F.2d 226 (5<sup>th</sup> Cir. 1992); Sharon Lease Oil Co. v. F.E.R.C., 691 F.Supp. 381 (D.D.C. 1988); Marcoux v. Mid-States Livestock, 66 F.R.D. 573 (W.D.Mo. 1975).

Regulations identical or similar to those of USDA have also been published by the Departments of Justice, Labor, Health and Human Services, the Environmental Protection Agency, Nuclear Regulatory Commission, and the Small Business Administration. The USDA regulations have been considered and upheld by courts, including the Eighth Circuit Court of Appeals in Schutterle v. United States, 74 F.3d 846 (8<sup>th</sup> Cir. 1996).

In any case in which an employee of the USDA is denied authority by the field head of the employing agency to appear in response to a subpoena, the employee is prohibited (under penalty of disciplinary action) from making that appearance or providing testimony. See 7 C.F.R. § 1.218.

If the subpoena in question also demands the production of records of USDA, that demand for records will be considered under USDA regulations governing production of records under the Freedom of Information Act ("FOIA"), and records will be produced promptly if permissible under that Act (see 7 C.F.R. § 1.1, et seq.). If the records being sought are available under FOIA, the custodian of those records may, upon request, certify their status as records maintained by USDA.

Should you have any questions concerning these issues, please contact this office or the United States Attorney's Office.